

**Formalism in the Judicial System;
with a Focus on the *Miranda* Decision**

An Honors Thesis (HONRS 499)

by

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A handwritten signature in black ink, appearing to read "James B. McKean". The signature is fluid and cursive, with a long horizontal stroke at the end.

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Purpose of Thesis

This topic was selected in response to Benjamin D. Ice's reading of *Guilty: The Collapse of Criminal Justice* (1996), by Judge Harold Rothwax. The issues raised in this book inspired Ben's study into the Supreme Court's effect on the efficiency and reliability of criminal justice. With apprehensions in regards to the necessity of the exclusionary rule as the remedy for police misconduct, Ben initially set out to critique the controversial decision of *Miranda v. Arizona* (1966). Throughout his study of the available empirical data, though, the focus of his thesis became more objective, and Ben tries to present this information in an impartial and complete study.

This thesis begins with a focus on the two potential goals of the United States criminal justice system, crime control and due process guarantees. The thesis then studies the actual *Miranda* decision, presenting the underlying arguments. Finally, it compiles the empirical studies done on *Miranda's* impact and presents them to the reader.

**Formalism in the Judicial System;
with a Focus on the *Miranda* Decision**

When the founders of the United States sat behind closed doors discussing the values their new government should be based on, they knew that the civil rights of its citizens occupied the top of their list. After living under the tyranny of England they feared the potential of a strong federal government. They wrote in the Federalist papers about their opinion of government actions without due process:

To bereave a man of life...or by violence to confiscate his estate, without accusation or trial, would be gross and notorious an act...Confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is...a...dangerous engine of arbitrary government. (Beard, 1948: 362)

The Bill of Rights represents their attitude and has become common knowledge because of the emphasis placed on it by United States citizens. They felt the need for a right to privacy, a right to pursue happiness and personal fulfillment, and a right for citizens to defend themselves against any act of government that would potentially put these rights into jeopardy. This thesis will focus on the rights of citizens, discussing how necessary they are and whether these rights have limited the effectiveness of our criminal justice system.

Due Process Laws have been established to guarantee that we, the people, never have our rights violated. Our justice system was designed as an intense adversarial arrangement that provides the accused with every possible avenue to maintain innocence. From the moment police arrest a suspect through the sentencing hearing, it requires that the government go to extensive lengths to prove, beyond a reasonable doubt, the facts of a case and the accused's guilt.

American idealism has led us, as a country, to fight for and defend our right to a presumption of innocence. We claim this right and cling to it so tightly that we admittedly allow guilty offenders to go free if their initial rights as citizens were violated.

After seeing many criminals go free, though, many people are speaking out, pulling the majority's attention back to another issue, the human right to live in a safe world. The universal right to be protected and safe is starting to rise in importance as victims, and a concerned public, begin to believe their deserved safety is being put in jeopardy as the criminally accused exercise their right to due process in our system, getting released from charges when procedural mistakes force dismissals of cases. Faith in our government, which was designed to protect the innocent, dwindles as people perceive guilty "criminals" walking out of courtrooms without having compensated society for their actions.

A journalist named Karl Zinsmeister wrote an article, publicizing the current public attitude. Studying 1990 statistics put out by the Bureau of Justice Statistics, he claims that only 18% of people arrested for violent felonies are convicted and sentenced to at least one year in prison. This is true with only 10% of drug felony cases. Among the people arrested for homicide, only 49% were sentenced to a year or more behind bars. Of rapists, this applies to only 29%. The typical inmate being released, in that report, spent seventeen months in prison. This represents only 45% of the average original court-ordered sentence. Zinsmeister closes his article by asking the popular question, That's our war on crime?" (Zinsmeister, 1990: 63)

With four out of five prison inmates being repeat offenders, a cynical attitude has developed in our country to the point where some feel, "It's us [the public] against them [the criminals], society can't protect both." (Zinsmeister, 1990: 59) Victims demand that the government focus more on protecting and serving the majority as compared to ensuring the accused an opportunity to fair treatment.

This thesis will explore the issues involved in deciding how much emphasis should be placed on our desire as individuals to be treated fairly by our government versus society's need to protect itself against criminal behavior. Citizens are calling out

for more emphasis to be put on getting offenders off the street, and protecting the innocent masses that have lived in fear, or a perceived threat of danger, throughout their lives.

In an effort to simplify and better explore these issues, this thesis will focus on discussions of the *Miranda* warnings. It will reference a single Supreme Court decision with hopes to both appeal to common public knowledge of the *Miranda* subject, and to take advantage of already developed scholarly opinions available for study. The cases leading up to Ernesto Miranda, and the actual *Miranda* decision, have changed expectations of justice in the United States. This case has become so famous and awareness so common that the majority of citizens could list these warnings, if asked, due to the exposure they receive.

History - prelude to Miranda

The concept of human rights has developed throughout history. As time has progressed, so has the emphasis on the protection of individuals, and perceptions on the universal rights of human beings. This evolution continues and has shed a new light on victims and society's emphasis on crime. As the United States extends its arm abroad to apply its ideals to others, there has become more pressure to reduce suffering and problems in this country. Along with economic issues, crime victims are an important part in political battles. This continued emphasis on discovering and maintaining human rights offers a promising new future for victims and victimology. (Elias, 1986: 197-198)

Two ideologies dominate the public's perception of our criminal justice system and its necessary goals. The Due Process Model and the Crime Control Model represent the two popular opinions about individual rights and the protection thereof. Herbert L. Packer (1968) labels and defines these models in his article *Two Models of the Criminal*

Process. The Due Process Model focuses on protecting the individual rights of the accused during the conviction process, while the Crime Control Model shifts the emphasis to the regulation of crime in society attempting to create an effective criminal justice system. Each of these pursue justice, but from opposing perspectives.

Packer (1968) writes that the modern American criminal justice system consists of a sequence of events which, taken in order, can lead to the conviction of the guilty accused. However, each of these steps along the way represent barriers which need overcome in order to progress to the next level. In theory, if the prosecution can successfully maneuver this obstacle course, then society can safely label the accused as guilty and punish them accordingly.

This system seems fitting after reading the writings of the founding fathers and their desire for fair treatment under government. Following their travel to the new world, unjust and unfair government was precisely what they wanted to leave behind them. Remembering this, the system they designed emphasized the protection of rights and a requirement that a government go to great lengths to prove convictions of the accused. The criminal justice system they drafted focuses on reliability, attempting to prevent oppression and the violation of innocent people's rights.

As time and technology progress certain things become evident under this criminal justice structure. First, as designed, the system takes a great deal of effort to run. In order to uphold citizens' rights the legal actors for the government have to take one step at a time, ensuring that they meet each right and requirement to ensure fairness and justice. This takes patience and places a limit on the efficiency of the proceedings. Under Due Process this does not represent a problem because this ideology places more emphasis on consistency and reliability than efficiency. It prefers to allow a guilty person to walk free by process of the proceedings than to place an innocent citizen behind bars.

Due Process focuses on the presumption of innocence. (Packer: 1968) It places the burden of proof on the prosecution in a criminal case, giving the benefit of the doubt to the accused. Once again the past experiences of the founding fathers surface in this attempt to correct the injustice they had experienced in their history. They show a distrust and cynicism about the role government can play in its search for justice by designing the Due Process system full of legal requirements and checks in an attempt to guarantee the protection of their individual rights and the pursuits thereof.

The opposing view values safe communities and citizens. Not that the Due Process Model doesn't, but the Crime Control Model places more concern on protecting society as a whole from criminal offenders than on protecting the rights of the accused. (Packer: 1968) It places emphasis on efficiency, requesting that the criminal justice system find offenders and lock them away before they have the opportunity to violate the public again. This model recognizes the same phases in the justice process, but allows less protection of the accused in order to successfully implement a justice system that successfully reduces crime to a minimum and maintains that minimal crime level. Society's safety is Crime Control's number one goal.

The Crime Control Model in no way promotes a presumption of guilt, but it does place a tremendous amount of faith in the investigative process. It believes that if an offender finds himself entering the system, there is a probability that they belong there. In other words, if a case makes it through the system to trial, more than likely the accused committed the crime if the judicial system hasn't thrown it out yet. This model emphasizes the preliminary stages in an investigation, and places faith in their reliability and predictability power.

Interestingly, both models, even with their opposing ideologies, make similar assumptions along the road to their concept of justice. First, each recognizes the differences between a criminally accused and a criminally convicted. They mandate that

a conviction occur before stripping a person of their constitutional rights. Second, both limit the role that the government can take in the process of investigating and apprehending an accused. This protects the civil and human rights of an accused and attempts to safeguard against abuse of power.

The relevant portion of the Fifth Amendment reads as follows: A citizen shall not “be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.” (Constitution of the United States, Fifth Amendment; Beard, 1948: 386)

Literally, the Fifth Amendment suggests only that a prosecutor may not call a criminal defendant to testify or witness, or to take the witness stand in their own case. It has long been understood, however, that a defendant’s rights expand to state that no one can be compelled to furnish evidence at any time that may be used against them, or may lead to evidence that may be used against them. (Uviller, 1996: 111) This assertion stems from a liberal interpretation of the right against self-incrimination. This right is not absolute; the availability of written documents may be required. (Uviller, 1996: 112)

The Fifth Amendment uses the word “compelled” to describe the actions prohibited in questions. The definition of “compelled,” as used in the Constitution, has drawn much debate. When the court eventually focused on it, they took it beyond the physical force or intimidation that most people easily see, and used it to encompass psychological compulsion as well. (Uviller, 1996: 111)

Throughout history, interrogation was the primary method used to identify the persons threatening the general well-being, and political authorities have perceived it as a legitimate tool for law enforcement officials to use. They have believed that an opportunity to confess allowed an offender to begin rehabilitation by accepting blame, starting the journey back to becoming a respectable member of society. At the same time, authorities have been concerned with limiting interrogations in a way that discourages

them from becoming a test of endurance, a violation of human rights. Even in the Middle Ages, when torture was somewhat acceptable in interrogations, there were restrictions and standards to be followed. (Caplan, 1985: 1421)

In fact, when a young Massachusetts drafted a proposed Massachusetts Bill of Rights it illustrated the attitude at the time. It said, "No man shall be forced by Torture to confess any Crime against himself...unless it be in some Capital case where he first be fully convicted by clear and sufficient evidence to be guilty." Once convicted "he may be tortured, yet not with such Tortures as be Barbarous and inhumane." (Levy, Origins: 345)

Until recently, people felt that tough interrogations of suspects arrested on probably cause was an integral part of the investigative process. Justice Jackson wrote that the "interrogation of those who know something about the facts is the chief means to the solution of crime." (Mayers, Shall We: 92) People have followed the logic that only a guilty man knows where the murder weapon, concealed body, or burglary cache is, and the location of this evidence must be obtained through questioning.

The feelings mentioned above were prevalent at a time when the public placed more confidence in police, when society saw criminals as a species apart rather than a member of their community gone bad, and when a confession was perceived as a statement of remorse, desperation, relief, or calculation. With the issues developed in the *Miranda* decision, the attention has turned from the suspect as a threat, to the suspect as a confessor where he is imagined by some as handicapped, a member of a minority group, or a person in a disadvantageous situation that became a victim.

For most of their history, American police, while interrogating, have relied on force and duress to elicit confessions. (Leo, 1992) In 1936 the Supreme Court outlawed the use of violent police tactics in the case of *Brown v. Mississippi*. At the time, an interrogation technique known as the "third degree" was prevalent. A modernized

version of the rack, southern law enforcement officers often used strategies that left little room for evasion by a suspect. In *Brown*, a sheriff beat up a suspect with a metal-buckled leather strap, obtaining a confession. The Supreme Court ruled that under the due process clause of the Fourteenth Amendment, this was a trial by ordeal, and not fair. The conviction was reversed.

This decision, though, left room for interpretation, for what about coercion of a less violent nature? The Court continued its journey in these issues when it reviewed *Chambers v. Florida*, in 1940. This case demanded a definition of due process. Police officers in *Chambers* threatened their suspect with mob violence as justice, and questioned Chambers continuously for five days and an entire night before his famous “sunrise confession.” The Court ruled his confession was not “voluntary,” and once again they reversed the conviction.

As these issues developed, the emphasis changed from police effectiveness to individual due process rights. Once the Supreme Court began requiring that a “voluntary” confession must be obtained appropriately, the questions focused less on the truth of a confession, and more on whether there was any questionable conduct on the part of the police in attaining it. Professor Caplan illustrates this as a problem. In reference to the voluntariness standard used to measure the willingness of a confession, “its elusive boundaries made the admissibility of a confession difficult to predict.” (Caplan, 1985: 1418)

With all this, by the 1960's law enforcement was beginning to show a greater sensitivity to constitutional issues, and the rate of illegal and jeopardizing police behavior was on the decline. After nearly thirty years of judicial development, the voluntariness test was an evolving moral inquiry into what was decent and fair in police interrogation practices. (Rothwax, 1996: 73)

Then, in 1962, the Supreme Court was presented with a case that could be referred to as the ideological forerunner to *Miranda*. In *Gallegos v. Colorado*, a fourteen year old Gallegos, along with two friends, followed an older man into a hotel, entered his room, assaulted him and stole \$13. The three of them had been on a day-long crime spree and this man was their second assault of the day. He died from the wounds. Later, based on descriptions they had obtained, two juvenile officers spotted Gallegos on the street with his two younger brothers. The officers invited the boys to sit in their car. While there Gallegos quickly admitted to the assault and robbery. He repeated his confession the next day, and five days later he signed a confession.

The behavior of the police was never called into question, and Gallegos was sentenced to life in prison. Before delivering his confession, Gallegos had been read his rights and willingly waived them. The problem that the Supreme Court had with the case was Gallegos's age of fourteen. The Court believed the officers should have allowed the parents to have access to their son during questioning.

In their opinion, the Court also raised an issue that surprised officers and introduced a new perspective on offenders. The Court referred to the offender as "a person who is not equal to the police in knowledge and understanding." This was shocking to many who asked why this inequality should be relevant to whether an otherwise voluntary confession is admissible as evidence. This statement is equivalent to saying that the defendant was no match for the officers. The police were smarter, and this wasn't fair to the defendant. This "inequality" the court developed provided the rationale that led to a reversal. Officers were shocked and bewildered. They believed that it should not be an equal contest in an interrogation room. Isn't inequality a tool used to gain leverage by police to convict an offender, they wondered.

Two years later, in *Escobedo v. Illinois* this idea was, once again, developed. This time, the concept of right to counsel entered the picture as well. After shooting his

brother-in-law, Danny Escobedo was questioned for several hours about the killing before his attorney could arrange his release. He made no comments to the police, and he demanded his right to counsel. Ten days later, during a second interrogation, the police had some new information from another suspect, a man named DiGerlando, that pointed at Escobedo for pulling the trigger. Escobedo denied the fact. During this second interrogation, Escobedo was trying to acquire access to his attorney, and his attorney was also unsuccessfully trying to see him while being retained outside.

The police challenged Escobedo to deny the charge to DiGerlando's face. When confronted, Escobedo shouted, "I didn't shoot Manuel, you did it!" These words incriminated Escobedo for having first hand knowledge of the murder.

The Court reversed Escobedo's conviction in a five-four decision. Their basis was the fact that Escobedo's attorney wasn't present at the time of the confession. This decision focused on the Sixth Amendment right to counsel, not the Fifth Amendment right against self-incrimination which usually dominated these arguments.

Circumstances and findings of *Miranda*

In 1966, the capstone was laid on these arguments, in *Miranda v. Arizona*. Actually, *Miranda* was four cases consolidated for a single decision. (Rothwax, 1996: 76) Ernesto Miranda, accused of rape, was almost not apprehended for this crime. While reporting to the police his victim, a young teenager, was shy and confused, sometimes contradicting herself. In fact, Miranda was placed in a lineup with two others, and the girl could not pick him out.

Forced by the weak identification by the girl and desperate to solve the case, the police used a trick to try and get Miranda to confess. When the lineup was over Miranda asked, "How'd I do?" The officer replied, "You flunked." By the time the interrogation

that followed was over, two hours later, Miranda had not only confessed to the rape, but also to the attempted rape of a second person and attempted robbery of a third. The officer brought the girl into the interrogation room. Miranda responded with, "That's the girl." (Rothwax, 1996: 77) Once in court, Ernesto was convicted, based on his confession and the evidence presented by the prosecution.

This whole time Miranda believed the girl had identified him in the lineup. However, this trickery was not the basis of the Supreme Court arguments. Justice Warren briefly touched on this issue in the majority opinion. It suggests that the government was not allowed to "persuade, trick, or cajole (the suspect) out of exercising his constitutional rights." (*Miranda v. Arizona*, 384 U.S. at 455)

Reasoning underlying *Miranda*

By studying the argumentation in *Miranda v. Arizona* we can learn what the legal actors in the case felt were the important issues. At the time of their arguments, all legal actors were keenly aware of *Escobedo v. Illinois* which had been decided two years previously, in 1964. The *Escobedo* case held that if a suspect confessed after having a request for counsel denied, that confession was excluded from evidence based on a violation of constitutional rights. Because of this focus on the Fifth Amendment an environment had been created, a backdrop where the topics being discussed for *Miranda* were already on the people's minds.

It his request for certiorari, Miranda argued that his case ought to be reviewed by the Supreme Court "so that the current widely conflicting treatment of a basic constitutional right can be resolved and substantial and similar justice attained by all accused persons wherever they live." (Kurland, 1975: Petition for certiorari, 605) The opposing brief, issued by the state, also wanted the case to reach the Supreme Court.

"The respondent agrees wholeheartedly with the counsel for petitioner that the confusion in this are must be dispelled in the interest of all concerned." (Kurland, 1975: Response to petition for certiorari, 607) With both sides recognizing and arguing the importance of a Supreme Court ruling, it is no surprise that certiorari was granted.

In addition, many parties presented amicus briefs to help develop the subject and sway the Court's decision. The National District Attorneys' Association argued that denial of defense counsel was not a violation of the accused's existing rights.

Whatever the purported rule is, it is new. Prior to *Escobedo*, the denial of counsel at any stage preceding arraignment was, at the very most, a factor in the "totality of circumstances" on the issue of voluntariness. Thus, differing from *Mapp v. Ohio*...and other cases which concerned fundamental rights, the denial of counsel, even upon request, was not a violation of any known constitutional precept...we embark on an uncharted constitutional course which leaves no opportunity for deviation...it is clear that here there is no stated law, no comfort of precedent. (Kurland, 1975: 761-762)

The American Civil Liberties Union also submitted arguments, these on behalf of the soundness of the *Escobedo* decision, which was called into question in the above brief by the National District Attorneys Association. The ACLU and attorneys for Miranda emphasized that the right to counsel was a fundamental constitutional right. They claimed:

It was within this context of police custodial interrogation aimed at eliciting a confession that the Court in *Escobedo* held that denying Escobedo the presence of counsel during the interrogation resulted in the confession being obtained in violation of his right not to be compelled to incriminate himself. Despite the furor raised in some corners about the revolutionary nature of this decision, it is submitted that the decision was not revolutionary, but rather the natural culmination of a series of cases. (Kurland, 1975: 725-726)

In its decision, the Court used the same argument promoted by Miranda's attorneys and the ACLU. It states, "[w]e start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized." The Court ruled that the right to counsel and to have knowledge of one's rights stood as a requirement established in the Constitution.

The important question may be asked, "What is due process?" According to the Court's decision in *Murray's Lessee v. Hoboken Land & Improvement Company*, "the constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process." (59 U.S. 272, 276) Instead, judges are allowed to exercise discretion, considering how changes ought to be taken in account in their decisions. (Posner, 1987: 23) Therefore, a judge is not required to uphold a procedure that was permissible 200 years ago, nor are they required to overturn one that was unthinkable then. Jules B. Gerard, author of *Capacity to Govern*, says he may disagree with the judge's decision in a case, but he would not deny the judiciary power to render judgments based on discretion. (Gerard, 1989: 106)

The reason due process requirements were implemented is for reliability in the judicial process. With these mandated procedures the cases which involve Constitutional violations should get weeded out throughout the process. Only cases that were properly processed reach a court verdict. This initiates the argument on exclusion of evidence. If it weren't for Fifth Amendment rights, suspects could be forced to take the stand, where a clever prosecutor could insinuate guilt. There is a cruelty in forcing an innocent person to defend themselves while their words are twisted and used in a context that suggests guilt.

Miranda was a struggle between the due process rights of the accused and society's rights to justice. The authoritative figures had to analyze this struggle and decide which argument best represented the needs of the people and the requirements of the Constitution.

To continue the study of the arguments in *Miranda*, the National District Attorneys' Association submitted a brief claiming that the public would not benefit from the *Miranda* right. In attempting to summarize the decision's expected effects they wrote

"it will benefit only the recidivist and the professional criminal. The first offender...will not be the beneficiaries. The innocent will take offense to the caution." (Kurland, 1975: 766)

The American Civil Liberties Union submitted a brief as well, designed to support their opposing opinion to the National District Attorneys Association. Focusing on the opposing argument, the ACLU's brief gave support to the claim that the *Miranda* rights would be beneficial.

It seems hardly necessary to argue at length that typical police custodial interrogation designed to elicit a confession is inherently compelling - inherently violative of the subject's privilege against self-incrimination. The subject is arrested and held incommunicado by the police until they are finished interrogating him. He is completely within their control, surrounded by hostile forces, and cut off - except at the whim of police - from any contact with the outside world that might give him support. Indeed, such a situation may well have been created for the explicit purpose of making the subject confess against his will. (Kurland, 1975: 718)

The ACLU further develops their argument by citing several police manuals designed to teach police officers the strategies of interrogations. This passage exemplifies the ACLU's claim that police are trained to downplay the rights of the accused. One manual read:

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. (O'Hara, 1956, p. 99; quoted by the ACLU in Kurland, 1975: 719)

The Supreme Court appreciated the arguments of the ACLU so much that in its opinion they referred to several of the same quotations used by the ACLU drawn from the police manuals, including the one above.

In designing the *Miranda* opinion, the Supreme Court attempted to alleviate certain pressures it felt were occurring in station houses across the country. The greatest concern focused on the voluntariness of confessions, and therefore their validity. An interrogation room can be an intimidating experience. Suspects have no one except police officers and detectives to talk to, no perceived freedom to come and go, no support from peers, and no tie to the outside. All these factors can convince a person to do "what it takes" to get out of a situation like that.

The Court made several weighted decisions in *Miranda* which have forced law enforcement officers to think about the ruling every time they do their job. *Miranda* created a clause which automatically disqualifies evidence from being admissible if these Fifth and Sixth Amendment rights are violated. Unless the fourfold warning is delivered, and absent a voluntary, knowing, and intelligent waiver, any admission or confession will be excluded from evidence in subsequent trial proceedings. (*Miranda v. Arizona*)

Another statement made by the Court reflects on public perceptions of law enforcement. Their opinion characterized police interrogations as manipulative and trickery. It suggests questionings are heavy handed and oppressive. Each of these characteristics contribute toward causing a suspect to lose their sense of freedom and tends toward them losing grasp and understanding of their constitutional rights. Without understanding their rights, a person may be more apt to allow themselves to be violated and temporarily ignorant of how they should be treated. (*Miranda v. Arizona*.) The court considers warning a custodial suspect as a safeguard, designed to protect a suspect's underlying Fifth Amendment privilege against self-incrimination. If a suspect volunteers a statement, it is admissible. However, once a question is asked, any response is barred from evidence unless the *Miranda* warnings are given and the rights of the accused are waived.

The reasoning underlying the *Miranda* decision was applied with several goals in mind. The judges believes the benefits would outweigh the costs if they created warnings to be given to suspects when they were arrested. The following are some of the benefits that have occurred.

The *Miranda* decision has forced law enforcement officers to adjust, to reinvent their strategies and learn what could be done to downplay the *Miranda* rights to suspects. Ever adapting, the police have adopted several techniques which aid them in getting a suspect to waive their rights and talk. First, officers try to condition a suspect to answer their questions. By positively reinforcing their non-threatening status, they use jokes, friendly gestures, and subtle comments to open a suspect up. Second, officers de-emphasize the potential importance of *Miranda* rights. By mentioning them in a nonchalant manner, they try to suggest that their are a minor formality that must be taken care of at the beginning in order to continue. Third, officers attempt to convince suspects that in their best interest, they should waive their rights and talk. Each of these techniques is designed to get a confession while working within the *Miranda* requirements. (Leo, 1996A)

Along with the above adjustments, *Miranda* has had other impacts on policing as whole. First, the *Miranda* warnings have had a civilizing influence on police interrogation behavior, professionalizing police practices by raising their awareness of federal laws. Second, it has transformed the police culture and the perspective officers have of the general public. Through *Miranda*, the shared norms, values, and attitudes of police officers in America have become more acceptable and public friendly. Third, officers are more aware of constitutional rights, along with the citizens. Finally, police have been inspired to develop more specialized, sophisticated, and seemingly more effective methods of interrogation. (Leo, 1996A)

Overall, these alterations in police behavior have impacted the citizens as well. Richard Leo, through his studies, established benefits that society has received through the *Miranda* controversy. First, the police profession has exercised more civility and practiced more restraint, increasing professionalism. Second, it publicized the emphasis on fairness in police procedures, a perception that helps police-citizen relations. Third, it has communicated, to the public, the moral and constitutional limits or methods police must apply when questioning citizens. Fourth, *Miranda* resulted in a more educated public, one more aware of its Fifth and Sixth Amendment rights. (Leo, 1996A)

While criticism still exists of the decisions made in the 1960s by the Warren Court, praise is offered by some to the efforts of that Supreme Court and its reasoning. When writing for the Court in 1984, Justice Byron White noted that that coercion was “inherent” in police interrogations where a suspect is in custody because the suspect “is painfully aware that he literally cannot escape a persistent custodial interrogator.” (*Minnesota v. Murphy*, 420) Along the same idea, Justice David Souter, in 1990, wrote in *Withrow v. Williams* that “prophylactic though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination *Miranda* safeguards a fundamental trial right.” (*Withrow v. Williams*, 1752)

Yale Kamisar agrees, claiming that *Miranda* did not, nor did it try to, limit police. He claims it allows a great deal of leniency for police when considering the extremes it could have taken. It left police with the freedom to listen to and act on volunteered statements, even if the volunteer was in custody. The *Miranda* rules allow police to obtain waivers of Fifth Amendment rights without the advice or presence of counsel or a judicial officer, and without any “objective recordation of the proceedings.” (Kamisar, 1990: 580)

Criticism of reasoning

The analysis of *Miranda* began before the Supreme Court ever made its decision. As the case was still being argued in the courts several renowned institutions made an effort to influence the court, submitting supplemental briefs to be considered. The National District Attorneys' Association listed several problems, in its brief, that it believed would occur if officers were required to read suspect's their rights.

First, it claimed that the proposed ruling would add to the present burden of interrogation. They suggest that cases were already difficult enough to prove, and that a *Miranda* decision would lower the conviction rate even further. Second, they felt that all confessions would be tainted by the possibility of claimed police misconduct. Third, such a ruling creates other issues, including the manner police are required to assume when presenting the rights. Fourth, they claimed such a ruling would only benefit recidivists and professional criminals, and not the innocent. Fifth, the added requirements would toughen the already difficult job of a police officer, encouraging their misconduct to make cases. (Kurland, 1975: 765-767)

In his dissent Justice White stated his belief that due to *Miranda* many criminals would either not be tried at all or will be acquitted. (*Miranda*, 542) Some members of the community feel the same as Justice White did, drawing attention to what they perceive is an injustice.

According to the Bureau of Justice Statistics, roughly two-thirds of all violent crimes committed in the United States are committed by repeat offenders. One has to ask how many of these violent crimes committed by repeat offenders would still occur if technicalities, such as *Miranda*, were not installed in the system and did not reduce the effectiveness of prosecutors. (Cassell, 1995: 32)

The public's outrage is surfacing, and with it comes the common arguments and concerns. "It's time we thought more about the victim and less about the criminal,"

many people cry. The struggle, though, is providing victims with rights without compromising those that have been established to protect the defendant. While it is not necessary to sacrifice one for the other, it will take more effort and resources than previously committed to provide justice for victims and still guard the fundamental rights guaranteed by the Bill of Rights to criminal suspects. The presumption of innocence, the right to be represented by counsel, the right to a speedy trial, and the right not to be forced into a confession would all be jeopardized if the court placed any less emphasis on the defendant.

In an emotional and powerful statement, Robert Sullivan communicates his perspective on the sacrifices being made for due process:

We as a society have breathed an ether that has dulled our senses and has almost put us to sleep if we believe that it is necessary to free nine guilty men rather than convict one innocent person. We must address each case independently with reasonableness and common sense so that the nine victims who have also appealed to the system for support and vindication are not left wanting. (Sullivan, 1988: 128)

The impact of this decision has been substantial. In 1976, a poll was taken of members of the American Bar Association. The goal of the poll was to determine "milestone events" in American legal history. The members voted *Miranda* as having the fourth highest ranking in overall importance, with no criminal law decision placing higher. (Caplan, 1985: 1417) This sentiment shows itself in the early opinions of the legal actors.

Initially, police felt it limited their investigation abilities, and politicians blamed the rising crime rate on *Miranda*. Richard Nixon went so far as to describe it, along with other Warren Court decisions, as a victory of "crime forces" over "peace forces." Congress even tried to invalidate its holding in the Omnibus Crime Control and Safe Streets Act of 1968. (Omnibus Crime Control and Safe Streets Act of 1968)

The Reagan Administration also made a stab at *Miranda*. The U.S. Department of Justice's Office of Legal Policy, under the Reagan Administration, characterized the

decision as illegitimate in a 120 page report, in which they urged the Supreme Court to overrule *Miranda* completely. (Office of Legal Policy, 1986)

While serving as the Attorney General of the United States, Edwin Meese made a statement reflecting this continuous concern.

The *Miranda* decision was wrong. We managed very well in this country for 175 years without it. Its practical effect is to prevent the police from talking to the person who knows the most about the crime - namely, the perpetrator. As it stands under *Miranda*, if the police obtain a statement from that person in the course of the initial interrogation, the statement may be thrown out at the trial. Therefore, *Miranda* only helps guilty defendants. (Meese, Reagan: 67)

Recently Joseph Grano claimed that *Miranda* has created a cynicism among legal actors and public officials. By establishing the *Miranda* rules, the Court elevated concerns for formal justice over concerns for substantive justice. This results in decisions conflicting with our substantive ideals, leaving law enforcement officers frustrated when their efforts are thrown out because of legal technicalities. (Grano, 1993) *Miranda* shifted legal inquiry from whether the confession was voluntary to whether *Miranda* rights were voluntarily waived. (Malone, 1986) According to Grano and Malone this change in emphasis contradicts the original goal of the law enforcement officer, to fight and prevent crime, and turns their job into an impossible and unrewarding assignment where little appreciation is experienced.

Miranda has been referred to by some as the "fox-hunter's argument." (Rothwax, 1996: 79) This creates the image that the Court attempted to level the playing field, to give the defendant a "sporting chance," by not letting the smarter and more prepared officer take advantage of the conditions. Why, though, would the court attempt to create this equality? Perhaps this reference to equality has egalitarian notions. It is perhaps unfair that less sophisticated people would not have the same knowledge, and therefore the same ability as more educated citizens, to refrain from self-conviction when being interrogated.

Perhaps the Court was attempting to stretch the adversarial basis of our legal system into the station house. The problem is that a police investigation is not adversarial, but inquisitorial in nature. Police officers are charged not with administering justice, but with searching through information to establish facts. By deciding in favor of *Miranda* and creating the warnings, the Court has tightly restricted officers' ability to probe and search for the truth.

Judge Rothwax, who views the rigidity in the judicial system as negative, calls *Miranda* "the triumph of formalism."

In my judgment, *Miranda* should be repudiated. It's bad constitutional law. It's ill-conceived policy. And most grievous, it has created a jurisprudence of formalism...With *Miranda*, appellate and trial courts are forced to decipher and apply rigid principles - often with no consideration of the Fifth Amendment's underlying concern with compulsion. We have come to the point where actual coercion isn't even the issue. (Rothwax, 1996: 82)

Judge Rothwax gives an example of this formalism. In a 1984 New York case, *People v. Ferro*, the defendant was arrested for a residential robbery of furs that developed into a murder. The detective in the case, after obtaining the furs from a codefendant's apartment, placed the furs in front of Ferro. Ferro, believing the officer had evidence that he committed the crime, offered incriminating evidence. He was convicted of murder, but his conviction was overturned on appeal. The appellate court stated that the detective who interrogated Ferro should have known Ferro would likely respond to the furs placed in front of him and should hear his rights. A convicted murderer went free for this violation through interpretation.

Judge Rothwax, in his book, states five reasons he believes *Miranda* should be overruled. First, he believes that the voluntariness test met the needs of the Court. If true, this would prove the 1966 *Miranda* opinion to be unwise and unnecessary. Second, it has introduced novel conceptions on the proper relationship between a criminal suspect and a law enforcement officer that has resulted in a hazardous judicial detour.

He believes the Court initiated the movement to empower criminal suspects against the police, with the Court believing that suspects were an underdog in a battle that should be made on equal grounds. Third, *Miranda* suggests that law enforcement is a game of chance in which the defendant should always have some prospect of winning. Law enforcement is based on consistent investigative techniques designed to lead to the truth. Police investigation is not a gamble, throwing accusations at people. Fourth, *Miranda* was a poor choice in a prime opportunity to restrain unlawful police conduct. He suggests that other options were not honestly pursued. Fifth, *Miranda* failed to develop into an understood and practiced law. It has technical issues that continue to arise about its meaning and scope. (Rothwax, 1996: 86)

He closes his argument by saying that the Court should not fear overruling *Miranda*, believing it will lead back to the Dark Ages of police abuse. He believes that as long as we are strong in our commitment to freedom and the protection of rights, honesty and fairness will be achieved. The key is the practice of criminal justice, not the formality.

In his book *Confessions, Truth and the Law* (1993) Professor Grano argues the extent of *Miranda* as a mistake.

Miranda does not have the virtue of furthering good policy. On the contrary, its antipathy to police interrogation and self-incrimination undermines...legitimate and weighty societal interests in law enforcement. Its ideology sits as a time bomb waiting to be triggered by a more sympathetic court.

Gerald Caplan has flatly stated that *Miranda* was not a wise or necessary decision, nor has it proved to be a harmless one, as some scholars argue. (Caplan, 1985: 1419) These scholars that Caplan refer to argue that considerable empirical evidence supports that when the warnings are given, they are rarely sufficient to overcome the "atmosphere of coercion" in custodial interrogation. They also say that the warnings are

not fully understood by suspects being arrested, and that a large majority of suspected offenders waive their rights to counsel and silence. (Allen, *The Judicial*: 518)

Factual assertions regarding *Miranda*

The current status of our society is demanding that the officials start thinking in terms of changing laws to make streets safer. What is being said? "Stop plea bargaining." With less reduced sentences and fewer bargained down charges less criminals would be on this street. This is not an option, though. In 1991, the Criminal Court of the City of New York had 1,000 cases a day to be resolved. At the time they had approximately 80 judges on that court, which allowed about four and a half minutes per case (Wachtler, 1991). If plea bargains were eliminated the judicial system would completely stop due to an overload of the court system.

"Put offenders in jail, and we'll stop crime." This also is not a realistic solution to limiting crime. In 1991, the New York penitentiary system held 55,000 people. That number has increased at such an incredible rate that prisons can not be built fast enough. Prisons don't have room for more offenders.

According to Fred Inbau, when the Supreme Court ruled on *Miranda* it was creating laws for a problem that "was already fading in the past." (Inbau, 1988: 31) According to the President's Commission on Law Enforcement and the Administration of Justice, in 1966 the third degree was almost nonexistent, and had been virtually abandoned by the police. (President's Commission, 1967: 93) In an empirical assessment, Professor Gerald Rosenberg stated that, "Evidence is hard to come by but what evidence there is suggests that any reductions that have been achieved in police brutality are independent of the Court and started before *Miranda*." (Rosenberg, 1991: 326)

Additionally, Justice Harlan made a point in his *Miranda* dissent. He states that *Miranda* was not designed to eliminate coerced confessions. He says: "The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." (*Miranda v. Arizona*, 505) He believes that there is no line of causation connecting *Miranda*, a reduction in police brutality, and falling clearance rates.

Charles E. Silberman developed his opinions on criminal justice in the 1970's, and focused on the exclusionary rule and its affect. Stating his opinion, he says that repealing the Exclusionary rule would not make police any more effective. Despite early complaints, he said police have not been handcuffed by the Warren Court, or its rulings. With the exception of minor drug offenses, he believes no evidence suggests that police make fewer arrests, or that prosecutors secure fewer convictions. (Silberman, 1978: 201)

While participating in routine patrol, as a spectator, Silberman recorded his experiences. One evening six incidents occurred while patrolling. None of the suspects or offenders received *Miranda* warnings. One guy confessed, but the officer wasn't worried about admissibility because he was confident the admission would be repeated at the station house after the rights were read. According to Silberman, if challenged, the officer would simply have lied, testifying that he gave the *Miranda* warning before beginning questioning. It would have been the word of an officer against that of a suspected criminal. (Silberman, 1978: 178)

Research testing factual assertions

Immediately following the decision in *Miranda v. Arizona*, a series of studies was done to determine *Miranda's* impact. Known as the *Miranda* Impact Studies, they were

carried out from 1966 to 1973. These studies found that not only did the *Miranda* decision not adversely affect the ability of police to control crime, but they showed that the *Miranda* warnings achieved several designated goals designated by the Court. A summary of the *Miranda* Impact Studies' claims follows.

First, the studies found that after an initial adjustment phase, police officers successfully adjusted to the new requirements. Second, despite expectations, suspects frequently waived their rights to attain counsel and remain silent and chose to speak to interrogating officers. Third, once a waiver was obtained, the strategies and techniques of interrogating officers did not change from those prior to the *Miranda* decision. Fourth, suspects continued to produce confessions and incriminating evidence, although sometimes at a lower rate of frequency. Fifth, confession rates dropped, but conviction rates remained steady. (Leo, 1996A)

The *Miranda* Impact Studies, however, are considered by most scholars as outdated and almost completely irrelevant. Scholars claim they are neither exhaustive nor conclusive. This void left by unreliable studies has led Richard Leo (1996A, 1996B), along with Paul Cassell (1995, 1996A, 1996B, 1996C), Stephen Schoenhofner (1981, 1996A, 1996B, 1997), and others to rediscover the old statistics and establish their true meaning.

In his article "Questioning *Miranda*," Gerald Caplan (1985) evaluates some of the studies done. His experiences show that *Miranda* took a toll on policing and its effectiveness. Caplan refers to a Pittsburgh study as the best measure of *Miranda*'s impact on crime detection. Pittsburgh, with a significant crime problem, compared before-and-after rates of confession in an effort to distinguish what variations in confession rates, if any, occurred. All offenses investigated in the study were homicides, robberies, burglaries, auto larcenies, or forcible sex cases.

Seeburger, who compiled the original Pittsburgh data, found that before *Miranda* in 54.4% of cases police obtained a confession. After the *Miranda* decision that dropped

31% to 37.5%. (Seeburger, 1967: 11) More specifically, the confession rates for robbery and burglary dropped from 60% to 40%. The drop is even steeper in homicide cases. (Seeburger, 1967: 12)

Studies have established that in approximately 20% of all criminal cases a confession is necessary in gaining a conviction, and in the Pittsburgh study 25% of the cases observed necessitated a confession for conviction. (Seeburger, 1967: 15) Caplan argues that as *Miranda* decreases the number of confessions, the number of cases cleared will decrease because one-fourth of the cases require a confession and will be lost.

In showing how important a waiver of *Miranda* rights is to acquiring a conviction, a second study recorded by Caplan was in "Seaside City," a large beach town in Los Angeles County. In this study of 478 files of data compiled by Witt in 1973, including before-and-after *Miranda* cases, an interrogations was necessary, or essential, in 24% of the cases in acquiring a conviction, and succeeded in producing incriminating evidence in 67% of cases. (Witt, 1973: 324) Caplan argues once again that if *Miranda* lowers the frequency with which suspects talk to police, convictions will decrease.

A third study was done in New Haven, Connecticut, a town with a low crime rate. This study interviewed fifty-five lawyers who had defended seventy-five cases during early 1966. In forty-nine of those cases a confession was obtained, aiding in the conviction. This high level of confessions suggests the importance of confessions in the conviction process, and how tampering with the frequency of confessions would directly effect the conviction rates.

Researchers in this study also discovered a 10% to 15% decline in the number of people who gave incriminating evidence from 1960-1966. The conclusion of this study states that "aggressive interrogation pays off in confessions." (Special, 1967: 1562) If officers are allowed to pursue a witness in an interrogation, they are more likely to be successful in attaining a confession.

To study the application of *Miranda* in a real-world setting, David Neubauer did a post-*Miranda* study with a concentrated focus on one county of 120,000 residents. He was curious about *Miranda's* effect on the conviction rate, and the relationship between the number of cases in which confessions were challenged and the number of cases which lost confessions. Out of 248 cases on the docket of the criminal court serving the Illinois county, 114 involved defendants who had made an oral or written admission. Only seven of the confessions were challenged, and only one challenge was sustained. (Neubauer, 1976: 166) This study shows a much lower rate of lost confessions, yet it must be reviewed with criticism. The bias in this sample comes from the fact that only one county of law enforcement was studied, with other counties unstudied possibly having different styles and methods in their practice. The study makes no reference to these possible variations between other counties, therefore its applicability remains questionable.

Paul Cassell has been arguing for years that *Miranda's* effect has been costly. While these costs are easy to identify, they're harder to quantify. Cassell's empirical research suggests that *Miranda* significantly reduced the rate of confession

He includes many studies in his reports. In the 1967 research effort in Pittsburgh mentioned above, confession rates dropped that year from 48% before *Miranda* to 32% after. (Seeburger, 1967: 12) In New York County, district Attorney Frank Hogan testified before the Senate Judiciary Committee that confessions fell from 49% to 14% in that same year. (Controlling Crime, 1967) Similar effects were reported in Chicago, Kansas City, Brooklyn, and new Orleans. An estimated consensus of these studies suggests that, due to *Miranda*, there was a 16% decrease in the confession rates of all criminal cases in the United State. (Cassell, 1995: 31) This interprets into one in every six criminal cases resulting in a lost confession due to *Miranda*. (Cassell, 1996A: 416, and Cassell, 1996B: 304)

Reliable confessions are necessary in approximately 24% of all cases to obtain a conviction. (Cassell, 1996A: 433) Cassell multiplies the decrease in the rate of convictions (16%) by the percent of cases that require a conviction (24%) to show that about 3.8% of the criminal cases are lost due to *Miranda*. (Cassell, 1996A: 438)

From this point, by applying the FBI index crimes statistics, 28,000 violent crimes (murder, rape, aggravated assault, and robbery) are lost, 79,000 serious property crimes (burglary, larceny, and car theft) are not successfully solved, and 500,000 cases for crimes outside the FBI crime index are lost per year due to *Miranda*. (Cassell, 1996A: 440)

Most of Cassell's early calculations were based on before-and-after studies done immediately following the Supreme Court's decision in favor of *Miranda*. He has broadened his conclusions by extending his studies into the 1990s. Evidence on confessions rates since 1967 have been spotty, but the studies with validity have shown that confession rates have failed to return to pre-*Miranda* rates. Before *Miranda*, confessions rates were around 55% to 60%. A study of six cities, done in 1977, reported a confession rate of 40%. (LaFree, 1985: 289) In 1993, a study from Berkeley found that detectives were successful in getting suspects to waive their rights in 64% of the cases. Thirty-nine percent of these waivers resulted in a confession. (Leo, 1994) Cassell's study in 1994, in Salt Lake City, Utah, reports a confession rate of only 33%. (Cassell, 1996C: 926) These data, referred to by Cassell as the limited few to be taken seriously, show that post-*Miranda* confession rates are lower than in the years before.

Some would argue that the reason confessions fell was that police were forced to give up unconstitutional, coercive techniques of interrogation. Historically, however, as the result of the due process "voluntariness" test, questionable interrogations began to decline in the 1930s and 1940s. (Leo, 1992: 38) By the 1950s, according to leading scholars, the number of coercive incidents had diminished considerably. (Leo, 1992: 51)

An additional way to analyze *Miranda's* effect, is by studying clearance rates

which are the rates at which police solve crimes. These figures would aid in analyzing police effectiveness. The Federal Bureau of Investigation collects such statistics and publishes them in their *Uniform Crime Reports*. The statistics on clearance rates have been viewed to reveal interesting effects resulting from *Miranda*.

The data published in the *Uniform Crime Reports* show a strong decline in clearance rates immediately following 1966, the year of the *Miranda* decision. From 1950 to 1965, the violent crime clearance rates hovered stable around or above 60%. Following *Miranda*, in the first three years, the rates fell from 60% in 1965, to 55% in 1966, to 51% in 1967, to 47% in 1968, to 46% in 1969. The violence crime clearance rates have, since then, consistently stayed around 45%. (Fox, 1978: 83)

While Paul Cassell believes *Miranda* caused the large drop in clearance rates, there are other factors that must be considered. For example, crime increased significantly during the 1960s. An increase in crime would increase the work load of police agencies, reducing their effectiveness. However, Cassell downplays this factor by arguing that in order for this factor to explain the substantial three-year change in clearance rates, crime rates would have to rise sharply from 1966 to 1968 while remaining stable before and after these years. Statistics show that crime rates were increasing long before the *Miranda* decision, and continued to climb afterwards, reducing its apparent effectiveness on clearance rates. (Cassell, 1996B: 307)

Other factor to be considered are the reduction of police officers in numbers available to solve crimes, an increase in crime-prone youth due to the baby boom, falling real dollar expenditures on crime fighting during times of high inflation, and increases in the unemployment rates. Paul Cassell has studied all these statistics, and has ruled them out as having noticeable effects resulting in a one-time change during the 1966 to 1968 period, as would be necessary to claim responsibility for the decrease in clearance rates. (Cassell, 1996B: 308)

Stephen Schulhofer takes a much different view in his studies, claiming that *Miranda* has not burdened the efforts of law enforcement officers in any way. "Common sense," he says, has been the basis for the belief in *Miranda's* restrictions, and he believes if the empirical data is studied, his conclusions will reflect his beliefs. By looking at his evidence, he shows that *Miranda's* supposed harmful effects fail to materialize. The rules of *Miranda*, he says, are porous, and police have gotten quite good at acquiring waivers. (Schulhofer, 1997: 352)

Professor Cassell's arguments placed great emphasis on police officials' negative reactions to *Miranda* in the late 1960s. Schulhofer counters with studies in the 1970s that show these views had dissipated. In fact, for the past twenty years, police officials have expressed the opposite view, that *Miranda* does not burden law enforcement. (Schulhofer, 1996B: 561) It stands to reason that officials would not have these views if they noticed a decrease in their effectiveness due to the warnings.

Schulhofer claims that one of Cassell's empirical mistakes was excluding data taken from Los Angeles in a post-*Miranda* study. In this case, more confessions were obtained after *Miranda* than before. Professor Cassell claims that variances in the methodology of this study warranted him dropping the research, but Schulhofer strikes back saying that when a study shows a drop in the confession rate, methodology loses its importance to Cassell. (Schulhofer, 1997: 354)

In his Salt Lake County research, in 1994, Professor Cassell reported a 42% rate at which suspects questioned gave a confession or incriminating statement. He suggests this rate is low in comparison to pre-*Miranda* levels. However, according to Schulhofer, Cassell fails to mention that his own research shows a pre-*Miranda* confession rate ranging from 40% to 45%. This figure appeared even lower in cities such as Philadelphia, Brooklyn, the District of Columbia, New Orleans, Los Angeles, and Baltimore. (Cassell, 1996A: 459) In addition, if incriminating statements were added into the data, as

necessary for a valid comparison, the success rate in Salt Lake County's custodial interrogations increases to at least 54%, exceeding results recorded before *Miranda*. (Schulhofer, 1996B: 509)

Cassell made the mistake, in his Salt Lake City study, of assuming, without justification, that many of the suspects studied would have eventually incriminated themselves because they would not have the power to stop an interrogation once started. According to Peter Arenella, this is problematic both empirically and normatively. (Arenella, 1997: 377) A researcher would have to account for the number of suspects who halted an interrogation or who did not confess after waiving their rights.

Schulhofer also attacks Professor Cassell's conclusions made on clearance rates, the percentage of crimes that police are able to solve. Schulhofer does not argue that clearance rates dropped, but he disputes the cause of the drops. In his opinion clearance rates declined as a reflection of the decline in the criminal justice system's clearance capacity. He claims that the dramatic change in clearance capacity provides the most likely explanation for the decline in clearance rates, also occurring at the same time. (Schulhofer, 1997: 356) Graphically represented, the lines representing the clearance rate and clearance capacity run parallel, increasing and decreasing at similar stages in history. As capacity to clear drops, so does clearance, suggesting a strong direct relationship.

In the mid-1960s, violent crime soared, but police resources increased at a much slower pace. The difference between the growth rate of violent crime and police resources widened dramatically after 1965. The spread stopped growing in 1969, just when the clearance rates stabilized. Actual figures for this fact show that in 1955 there was a clearance rate of 64%, according to Schulhofer. At that time 121 police officers were on the job for every 100 violent crimes. By 1970, the number of police officer personnel dropped from 121 to 45, and in 1997 28 officers are recorded for every 100

violent crimes, less than one-fourth of the number from the 1950s. (Schulhofer, 1996A: 288) These numbers represent the effect of limited resources on the clearance capacity.

With a decline in resources came a decline in the number of officers and dollars available to investigate reported crimes. This would cause the capacity to solve crimes by the number of officers on the job to decrease also. (Schulhofer, 1997: 360) The clearance rate per officer has increased significantly. From 1962 to 1969 officers became statistically responsible for twice as many crimes to clear. While officers may have become more efficient, the clearance rate dropped because the number of crimes increased at a greater rate than officers, due to financial limits in resources.

Another important figure to be conscious of is the actual number of crimes cleared. The number of violent crimes cleared per year has risen over time, beginning a steep incline in 1962. By studying the years and the number of crimes cleared, *Miranda* had no visible effect on the number of crimes cleared. The increase remained constant after 1962, not decreasing immediately after 1966 which is the year of the *Miranda* decision.

Richard Leo has also published a record of data on the subject of *Miranda*. His study, one of the first thorough and valid ones done, was based on over 200 police interrogations, and more than nine months of participant observation field work inside the criminal investigation divisions of three police departments. Richard Leo personally observed these cases, as they developed, in an effort to analyze *Miranda's* impact on the law enforcement community and its effectiveness. He observed in three cities with diverse population bases. (Leo, 1996A: 652)

In his study, detectives delivered the *Miranda* warnings to all suspects legally mandated, 96% of the cases. In the 7 which the suspect did not receive their rights, the suspect was not in custody for the purpose of questioning. (Leo, 1996A: 563) Therefore,

there was no legal requirement for the *Miranda* warnings to be read in these cases.

(*Miranda v. Arizona*, 384 U.S. 436, 444)

Out of the options for suspects to pursue once read their rights, 78% of the suspects waived their rights. Twenty-two percent of the suspects invoked their rights. If a suspect chose to embrace their rights, the interrogation was terminated. If the rights were waived, an interrogation began. (Leo, 1996A: 664)

In Justice Warren's Court, speculation had it that underprivileged suspects were less likely to be aware, and therefore less likely to invoke, their Constitutional rights. Leo learned that in his sample, the only variable with any noticeable effect was whether a suspect had prior convictions ($p < .006$). Suspects with no prior criminal record waived their rights 92% of the time. Suspects with prior misdemeanor convictions waived their rights 90% of the time. Suspects with prior felony convictions waived their rights only 70% of the time. This data shows that prior offenders understood the importance of silence and claiming the right to a lawyer. (Leo, 1996A: 655)

Important to his study was discovering how the suspect's response affected the prosecutor's decision to continue pursuing a case. When a suspect waived their rights, the prosecutor charged them in 69% of the cases. When a suspect responded to the warnings by invoking their rights the prosecutor charged 73% of the time. This variance is too minimal to have much value in analyzing whether the prosecutor was swayed by a suspects response. (Leo, 1996A: 656)

Leo found that those who waived their rights were more likely to get convicted by almost ten percent. If a suspect waived their rights they were convicted 63% of the time. If they invoked their rights they were convicted in 53% of the cases. (Leo, 1996A: 656) With this data, Leo proved the importance of confessions to officers in gaining convictions by prosecutors. If criminals studied this data they would learn that the

intelligent thing to do would be to invoke their rights, decreasing their chances of being found guilty.

Equally important was a study to see how plea bargaining was affected. It is a suspect's confession that will affect a prosecutor's need to plea bargain. If efficiency is the primary concern, a suspect that talks can be encouraged to plea bargain, using their confession for leverage.

Here the statistical findings are significant, proving the latter suggestion in the previous paragraph that a suspect who waives their rights tends to plea bargain. In cases where the suspect responded to the *Miranda* warnings by waiving their rights, a plea bargain was arranged in 49% of the cases. In cases where suspects invoked their rights, plea bargains were only made in 24% of the cases. (Leo, 1996A: 657) This statistic shows the importance of a suspect that communicates in obtaining clearance. This suggests that it is in the best interest of offenders to waive rights and receive a lesser sentence through plea bargaining. This, of course, only holds true if the prosecutor can't prove the case in court.

Finally, sentencing is a concern. The more evidence presented the more serious the charges are that can be brought against an offender. With greater charges comes a more serious sentence that can be imposed. The more evidence, the more persuaded a judge or jury can be to punish severely.

Leo found that those who invoke their rights and refuse to talk to officers receive stiffer sentences. For those who waived their rights, 37% received low severity punishments, with 12% receiving high severity punishments based on the seriousness of their crime. The offenders who invoked their rights received low severity sentences only 28% of the time, and they received high severity sentences in 19% of the cases. (Leo, 1996A: 658) Whether low cooperation angered judges and juries, or whether prosecutors

argued stronger and with more passion, the statistics show a substantial difference in the sentencing process.

Leo (1996) has found that *Miranda* has placed little costs, if any, on the public. He states that *Miranda* does not increase the likelihood that potentially guilty suspects will not choose to cooperate with police. Following up on the public's greatest fear of *Miranda*, his statistics suggest that the number of exclusions of evidence due to improper *Miranda* warnings is less than one percent. (Leo, 1994)

According to Leo, *Miranda* results in a marginally lower conviction rate. He states that suspects who waive their *Miranda* rights were almost ten percent more likely to get convicted than their counterpart. *Miranda* also leads to a lower rate of identifying accomplices, clearing crimes, and recovering stolen property.

In a qualitative analysis of his study, Richard Leo argues that police have adapted to *Miranda's* requirements by designing an environment in which a suspect, along with hearing their Constitutional rights, will waive their rights and confess. He states that the long-term effects of *Miranda* on policing has been to alter the practice and ideology of the interrogation, despite the high waiver rate.

Another way to analyze the effects of *Miranda* is to compare the current conviction rates with those in other countries, who follow different approaches to regulate police interrogations. Since *Miranda*, American police obtain confessions in perhaps 40 percent of all cases. Police are much more successful in other countries. In Great Britain, following the "Judges' Rules," which allow only limited advice on rights, confession rates were estimated from 61 to 85 percent. Confession rates in Canada appear to be substantially high than the United States, post-*Miranda*, as well. (Cassell, 1995: 32)

Overall assessment of arguments and assertions

As previously mentioned, the founding fathers implemented a due process emphasis in the Constitution of the United States, and the people embraced this structural design because they too had felt injustice and recognized the need to control government. However, the times have changed and today the search for justice faces different obstacles. The courts of America overflow with cases, limiting the effectiveness of the judicial system and, in turn, limiting the effectiveness of law enforcement.

In addressing the 119 Annual Congress of the American Correctional Association, Maryland House of Delegates Representative Timothy Maloney said in his opening speech, "Today, in nearly every city and every state, our prisons and jails are exploding." (Maloney, 1989: 122) Overcrowding represents an important and demanding obstacle because the citizens of the United States believe that due to the limited resources available to the criminal justice system guilty criminals walk away from crimes unpunished, and they believe that the frequency of such incidents continues to rise.

This perception brought on the Crime Control mentality. As the public perceives more and more criminals escaping accountability they feel a greater threat of danger. As they sense a greater chance of danger their fear turns into concern and popular opinion has begun a shift. It seems that this desire to live in a safe society is gaining momentum and public awareness. The fact that people now build walls around their communities represents a growing concern for the criminal justice system. The obvious question becomes, should citizens live in fear and threat of crime in order to maintain that the criminally accused receive the greatest protection of justice and opportunity for acquittal allowed under the constitution. Some people seem to believe this represents an unfair exchange of rights and now cry out for a new analysis to be made of the weights that should be placed on these opposing goals of the criminal justice system.

Most Americans are willing to limit and adjust some of their individual rights in exchange for improved public safety. Amitai Etzioni suggests that only minor changes need implemented to achieve noticeable results. (Etzioni, 1991: 4) If these changes could be identified, the majority would willingly sacrifice for a more secure future.

Judge Wachtler beckons, in his article *Reflections*, for other judges, as educated and powerful people, not to be influenced by these people calling for more victim's rights. He says it is their responsibility to maintain the balance, and ensure that certain rights are not eroded. His argument turns to focus on what he considers the root problem. The judicial system can push criminals as severely as desired, but this will not stop crime. The only answer is education.

The Founding Fathers founded this country on the democratic principles, but they provided for elected representatives to ensure that educated decisions were made. Where should the balance hang between majority wants and the actual decisions made? In closing an article addressed to his legal peers, Judge Sol Wachtler promotes judges following their legal conscience with more conviction than that used in catering to popular opinion.

The immediate challenge for the bench and bar, again, is to remember that we have a sacred obligation with respect to protecting individual liberties - not by caving in to the will of the majority, because we won't be measured by what we do to cater to that will. We'll be measured by what we do to protect the rights of individuals. (Wachtler, 1991: 74)

Professor Henderson, author of "The Wrongs of Victim's Rights", also cautions against losing the traditional focus of the justice system when attention shifts toward the victim. She suggests that the popular image of a victim has become a blameless person, one which we all can identify with. This results in an over-sympathetic, emotional public, willing to blindly create rights for victims without considering their effects on defendants. (Henderson, Wrongs)

Miranda has continued to develop in the 1990s. In *Minnick v. Mississippi*, in 1990, the Court expanded its *Miranda* decision. The question was whether, once a defendant had consulted with counsel, could police resume questioning if counsel was not present. The Court held that once a defendant in custody declines to talk to police without a lawyer, police can not initiate questioning again without the lawyer present. This decision brought out a major argument about *Miranda*'s effect. The judges in dissent complained the decision was, in effect, "an effort to protect suspects against what is regarded as their own folly. The sharp-witted criminal would know better than to confess; why should the dull-witted suffer for his lack of mental endowment?"

Judge Scalia added, "Even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected." He continued to say that rulings such as these barred confessions that would make society safer and serve to rehabilitate an offender. (Stewart, 1991: 43)

According to Carol Steiker, the Supreme Court has added decisions since *Miranda* that encourage police officers to violate the warnings established in 1966 whenever the benefits of the violation outweigh the cost of compliance. In *Harris v. New York* the Court ruled that the state could use suspects' statements taken in violation of the *Miranda* mandates to "impeach" their credibility if they attempt to testify on their own behalf. (*Harris v. New York*, 222) *Oregon v. Elstad* allows the state to use "evidentiary fruit" of most *Miranda* violations in its case in chief. *Oregon* also encourages officers to delay in delivering the warnings because the exclusion of unwarned statements does not require that the suspect cannot repeat their confession after hearing their rights. (*Oregon v. Elstad*, 298) If a suspect confesses before officers read the *Miranda* warnings, they will be more willing to repeat their confession

On the other hand, other scholars argue that American police have responded to the *Miranda* requirements by developing new, more sophisticated interrogation strategies based on manipulation, deception, and persuasion. According to some interpretations of research, their new strategies have been just as effective as the early ones. (Leo, 1994) Modern interrogation techniques resemble the structure of a classic confidence games. This helps to explain why custodial suspects waive their rights, an unintelligent thing to do.

In their modern techniques, officers create the appearance to suspects that the two parties are on equal ground. Once offenders are pumped up, the persuasion by police begins. *Miranda* has transformed police power with little or no effect on confession rates, according to Schulhofer. Police have embraced *Miranda* as a legitimating symbol of their professionalism. (Leo, Police) At the same time it has inspired police to create new strategies for the interrogation room, allowing them to act as confident men and to develop their skills in human manipulation and deception. Leo states:

Driven by careful strategic considerations, police interrogators exercise power by manipulating custodial suspects' definition of the situation and of their role; by creating the appearance of a symbiotic rather than an adversarial relationship; by appealing to their insider knowledge and expertise; and by exploiting the suspects' ignorance, fear and trust. (Leo, 1996B: 285)

The Constitution does not refer specifically to "confessions" or "admissions," voluntary or involuntary. It does not state that a convictions based on a coerced confession cannot stand. It does not extend itself to say that convictions based on a coerced confession must be over-turned, no matter what the evidence, which is a rule known as the "rule of automatic reversal." (Amsterdam, 1970: 805) These concepts have developed as judges attempt to interpret the will and intent of our forefathers, while applying the Constitution to today's circumstances.

In studying the truthfulness of confessions and their usefulness in the criminal justice system, scholars have discovered that if a coerced confession turns out to be trustworthy, in that instance coercion advances the search for truth. This shows the positive potential of coercion. Some people feel this positive benefit could be used in trial. Permitting the use of coerced confessions, however, would eliminate the guarantee against unconstitutional police interrogations. This leads to the question, is there a way to allow necessary, yet coerced, confessions to remain as evidence and still protect Constitutional rights. (Kamisar, 1990: 548) Are there available alternatives to the *Miranda* mandates which also educate the public and protect their Fifth Amendment rights?

Prior to *Miranda*, various state laws made it a criminal act to deny a lawyer the opportunity to meet with a suspect in custody, or to fail to notify the relatives of an arrestee. Other state laws penalized police officers attempting to solicit confessions by violence, threats, or other objectionable means. Add the fact that false imprisonment and assault are tort offenses, and these make up potential remedies to unconstitutional police behavior. (Kamisar, 1990: 548)

The problem with excluding evidence is that it "is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found." Why not admit confessions which, although coerced, are verifiable? Let the "remedies of private action" and the internal discipline of police forces, carried out under the watchful eye of the public deal with these violations. This would promote justice while discouraging unconstitutional behavior. (*Wolf v. Colorado*, 31)

For their stated reasons, the Court has ruled in favor of excluding evidence and has chosen to overlook the alternatives above. Perhaps they are trying to safeguard the public, not allowing the government to profit from its wrongdoing. Perhaps it feels the "natural way" to respond to such a violation is to "nullify" it. Perhaps their ruling is

designed to maintain respect for the Constitution, using its decisions as a symbol of dedication to individual rights. Perhaps these alternative remedies used before *Miranda* were difficult to enforce, being inconsistent.

Justice Traynor wrote the majority opinion on the California Supreme Court case, in 1955, that adopted the concept of excluding illegally obtained evidence and confessions. He explained, in later writings, that his concerns grew as time after time he observed illegally obtained evidence being offered and admitted, as a routine procedure. He accepted that occasionally an officer would make a mistake, forcing illegally obtained evidence to be admitted to get a conviction. To him, though, it was quite different when such practices became common. For him, these observations led up to the great measure of rejecting all illegal evidence. "It had become all too obvious that unconstitutional police methods of obtaining evidence were not being deterred in any other way," he writes. (Traynor, 1962: 321)

In the opinion of Yale Kamisar, if Congress enacted a statute replacing current rules of exclusion with a "streamlined tort remedy" to what we now refer to as *Miranda* violations which would establish consistent punitive rulings for violating officers, few people would complain. Under this situation, if such a remedy were designed, the "extreme sanctions of exclusion" would no longer warrant themselves necessary or appropriate. No longer could case dismissal "pay its way." (Kamisar, 1990: 562) In reality, though, according to the classic article on the subject, the overwhelming consensus is that civil suits, criminal prosecution, injunctions, review boards, and internal police discipline are poor, inadequate replacements for current requirements. (Foote, 1955: 493)

In an argument against civil tort remedies taken against violating officers, Professor Dripps writes on a report put out by the United States Department of Justice in 1986. This report, titled *Report to the Attorney General on the Search and Seizure Exclusionary*

Rule, identifies two reasons why the civil solution would fail. First, juries tend to sympathize with the police and not with criminals, introducing a bias into the system which would limit justice. Second, obtaining evidence illegally does not create damages that the civil court system can adequately compensate. (Dripps, 1990: 629)

Many years after *Miranda*, Justices Brennan and Marshall wrote that "the cost" of their decision is that "some voluntary statements will be excluded." Justice Marshall continued on the idea when he wrote, "No sane person would knowingly relinquish a right to be free of compulsion." Here is where a potential problem develops. According to Leo (1996) suspects do continue to choose to waive their Constitutional rights. Leo's figures show that both Justices were wrong. So is Judge Rothwax when he claims that, "In our system, a man or woman who takes responsibility must be crazy!" (Rothwax, 1996: 79) By looking at Leo's data, either Rothwax and the Supreme Court Justices Brennan and Marshall miscalculated, or there are a great number of "crazy people" being arrested.

Conclusion

To put *Miranda* in perspective, if, as stated by Uviller, 75% to 80% of convictions in major crimes depend upon confessions, think of the devastating potential effect on criminal justice if every suspect exercised their Constitutional rights and gave no confession. (Uviller, 1996: 130) The importance of reliable confessions and interrogation techniques becomes frighteningly clear.

The two dominant scholars, Paul Cassell and Stephen Schulhofer, agree that only a small percentage of suspects actually assert their *Miranda* rights. However, Cassell believes the Court exceeded its boundaries by placing "shackles" on the police with *Miranda* safeguards that give criminal suspects far more protection than they deserve.

According to him, even one lost incriminating admission exceeds what society should have to tolerate.

Schulhofer prefers to see *Miranda* as an appropriate constitutional response to a difficult problem, a response that represents an improvement over prior mandates on the issue of Fifth Amendment rights. According to Schulhofer, when a great deal of effort is put into blaming *Miranda* for problems in the criminal justice system, it disparages the importance of criminal justice resources and the number of police officers on the street. This serves the victims of crime poorly. It creates a dangerous diversion from the issues that actually affect the safety of streets and the quality of civilization. (Schulhofer, 1997: 348) According to him, if society cares about present and future victims, it must insist that debates focus on issues that make a difference, and *Miranda* is not one of them.

Why does such a controversy surround the awareness of rights? Because, tracing back in history, individual rights were the basis of the country. They were the motivation for its founders. In the judicial system, the rights to due process and to counsel represent substantial factors that play a role in a conviction. As Justice Blackmun points out, "The lawyer occupies a critical position in our legal system because of his unique ability to protect...a client under custodial interrogation." In this legal system, "whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." (*Fare v. Michael*, 719)

When looking for alternatives to the *Miranda* mandates, many people become frustrated. Due to the bureaucratic nature of the government, flexibility is non-existent, which translates into limited change. The energy of potential legal innovators gets drained, as claimed by Marvin Wolfgang. He says that the bureaucracy of the United States government turns the vigor, enthusiasm, and imagination in the criminal justice

system into rigidity, rationalization for faults, and intellectual banality. (Wolfgang, 1972: 21) These obstacles restrict optimism on future reform of these issues.

Even if the Court overruled *Miranda*, police would have to continue to advise people of their rights. According to Professor Israel, the concept of public education is an important part in establishing the voluntariness of a confession. (Israel, 1977: 1386)

Many scholars agree the *Miranda* decision is a symbol. It is an important symbol of the criminal procedures the citizens are guaranteed. Such a symbol is "a gesture of government's willingness to treat the lowliest antagonist as worthy of respect and consideration." (Caplan, 1985: 1471)

To quote Stephen Schulhofer, in a passage that suggests he sometimes shifts his opinion under different arguments and circumstances, he responds to the issue of how aggressive the *Miranda* decision was in dealing with Fifth Amendment rights:

I am not so sure. *Miranda* undoubtedly serves important symbolic functions. It also affords certain concrete advantages over the due process test...*Miranda* does not (however)...come directly to grips with the dilemma arising from our simultaneous commitments to the privilege against self-incrimination and to a law enforcement system in which police interrogation is perceived as a necessity. If anything, *Miranda's* technique for denying this dilemma, for insuring that we can have our cake and eat it, is infinitely less candid than the due process balancing analysis.... Seen as a compromise, *Miranda* is well worth retaining. Whether *Miranda* represents the best possible compromise, and indeed whether compromise is required at all, remain open questions. (Schulhofer, 1981: 883)

The empirical evidence on this issue has been interpreted to portray *Miranda* in both a positive and negative light. Whichever has the most validity, the most important thing is that the United States citizens and law enforcement officers accept the *Miranda* requirements and integrate them into their daily practice. It is only through consistent use that the criminal justice system can run smoothly and effectively until either more clear results are discovered, or a much more popular and reliable method for guaranteeing citizen's rights becomes evident.

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